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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 788.

ALEXANDER ALLEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED AUGUST 23, 1894.

(15672.)

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a Pleas and proceedings before the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, in the case of—

UNITED STATES
vs.
ALEXANDER ALLEN. } Indictment for murder, No. 58.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, November term, A. D. 1892.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, and sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Alexander Allen, on the 14th day of May, A. D. 1892, at the Cherokee Nation, in the Indian country within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Phillip Henson, a white man and not an Indian, then and there being feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Alexander Allen, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Alexander Allen, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off, to, against, and upon the said Phillip Henson, and that the said Alexander Allen, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Alexander Allen did charged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Phillip Henson, in and upon the left side of the breast of him, the said Phillip Henson, giving to him, the said Phillip Henson, then and there with the leaden bullet aforesaid, so as discharged and shot out of
2 the gun aforesaid by the said Alexander Allen in and upon the left side of the breast of him, the said Phillip Henson, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Phillip Henson, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Alexander Allen him, the said Phillip Henson, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) United States vs. Alexander Allen. Murder. A true bill. Clyde C. Patton, foreman. Witnesses: George Erne, 4 mi. S.

Coffeyville, Kan.; Willie Erne, 4 mi. S. Coffeyville, Kan.; N. M. Clifford, Coffeyville, Kan.; W. A. Henson, Sedan, Kan.; A. W. Knotts, Coffeyville, Kan.; Magdaline Erne, 4 mi. S. Coffeyville, Kan.; A. G. Thompson, 4 mi. S. Coffeyville, Kan.; J. A. Aldridge, 4 mi. S. Coffeyville, Kan.; J. W. Hayden, Lenepah, I. T.; Geo. Quackenbush, Coffeyville, Kan.; Thos. N. Buford, Oolagah, I. T.; Geo. Quackenbush, Coffeyville, Kan. Filed in open court Nov. 11, 1892. Stephen Wheeler, clerk, by I. M. Dodge, D. C.

3 In the circuit court of the United States for the western district of Arkansas, Feb. term, 1894, Monday morning, 8½ o'clock, Feb. 19, 1894.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES } Indictment for murder, No. 58.
vs.
ALEXANDER ALLEN. }

On this day, in obedience to a mandate of the Supreme Court of the United States, it is hereby ordered that the verdict of guilty, heretofore returned by the jury in this cause be, and the same is hereby, set aside and held for naught, and that this cause be docketed and the said defendant, Alexander Allen, awarded a new trial.

TUESDAY, *March* 13, 1894.

(Caption omitted.)

Ordered by the court that this cause be continued to the May term, 1894, of this court, and set down for trial May, 15, 1894.

SATURDAY, *April* 7, 1894.

(Caption omitted.)

Ordered by the court that Albert Marks, James Marks, Harvey Marks, and Wm. Marks, heretofore allowed as witnesses in this cause, be subpoenaed for May 15, 1894, at the expense of the United States in behalf of said defendant.

4 MAY TERM, TUESDAY, *May* 15, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files an application for additional witnesses in this cause at the expense of the United States, which is by the court allowed for Ollie Morgan, and a subpœna ordered to be issued for her returnable forthwith.

FRIDAY, *May* 18, 1894.

(Caption omitted.)

Whereas a mandate of the Supreme Court of the United States, granting a new trial in this cause, was received and spread upon the records of this court Feb. 19, 1894—

It is therefore hereby ordered that the judgment and sentence of this court upon the verdict of guilty by the jury in this cause be, and the same are hereby, set aside and held for naught.

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, C. J. Frederick, esq., and J. B. Rush, esq.; and it appearing *form* the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause; and *that* that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and the said defendant having heretofore had hearing
5 of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit:

Chas. F. Covington,	John N. Mable,	Christopher C. Pointer,
Robt. C. Horner,	Geo. T. Mullen,	Hugh Proctor,
Alfred F. Johnson,	Wm. D. Morgan,	Wm. C. Reed,
Hugh H. Layman,	Perry F. Parker,	Andrew A. Tuggle,

twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence. Whereupon, after a statement of the case by counsel for both plaintiff and defendant and there not being time to further progress in the trial of this cause, the jury was put in charge of a sworn baliff of this court.

And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and baliff in charge until discharged by order of said court.

SATURDAY, *May* 19, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, C. J. Frederick, esq., and J. B. Rush, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn baliff of this court, to wit:

Chas. F. Covington,	John N. Mable,	Christopher C. Pointer,
Robt. C. Horner,	Geo. T. Mullen,	Hugh Proctor,
Alfred F. Johnson,	Wm. D. Norman,	Wm. C. Reed,
Hugh H. Layman,	Perry F. Parker,	Andrew A. Tuggle,

6 who took their seats in the jury box, and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

MONDAY, *May* 21, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant

in custody of the marshal, and by his attorneys, C. J. Frederick, esq., and J. B. Rush, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Chas. F. Covington,	John N. Mable,	Christopher C. Pointer,
Robt. C. Horner,	Geo. T. Mullen,	Hugh Proctor,
Alfred F. Johnson,	Wm. D. Norman,	Wm. C. Reed,
Hugh H. Layman,	Perry F. Parker,	Andrew A. Tuggle,

who took their seats in the jury box, and after hearing the remainder of the evidence and the argument of counsel, and receiving the charge of the court, retired in charge of the sworn bailiff aforesaid to consider of their verdict.

TUESDAY, *May* 22, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, C. J. Frederick, esq., and J. B. Rush., esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

7	Chas. F. Covington,	Jno. N. Mabel,	Christopher C. Pointer,
	Robt. C. Horner,	Geo. T. Mullen,	Hugh Proctor,
	Alfred F. Johnson,	Wm. D. Norman,	Wm. C. Reed,
	Hugh H. Layman,	Perry F. Parker,	Andrew A. Tuggle,

who returned into court the following verdict, to wit: "We, the jury, find the defendant, Alexander Allen, guilty of murder as charged in the within indictment."

(Signed) CHAS. F. COVINGTON, *Foreman.*

On motion of the defendant, by his attorney, the jury was polled and each juror answered for himself that the verdict as read by the court was his verdict.

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

THURSDAY, *May* 24, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his motion to set aside the verdict of the jury and for a new trial in this cause.

MONDAY, *July* 2, 1894.

(Caption omitted.)

On this day come on for final hearing the motion heretofore filed to set aside the verdict of the jury and for a new trial in this cause, and the court being well and sufficiently advised in the premises doth overrule said motion.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Alexander Allen, was brought to the bar of

this court in custody of the marshal of said district, and it being
8 demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 22nd day of May, 1894, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said. Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Alexander Allen be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Alexander Allen to be taken hence, and him, the said Alexander Allen, safely and securely keep from the date hereof until Thursday, the 20th day of September, A. D. 1894, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Alexander Allen to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Thursday, the said 20th day of September, in the year of our Lord one thousand eight hundred and ninety-four, cause the said Alexander Allen to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America have and recover all its costs in and about this prosecution laid out and expended, and that it have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

9 MONDAY, *July 2nd*, 1894.

(Caption omitted.)

Ordered by the court that the said defendant have twenty days from this date in which to file his bill of exceptions in this cause.

FRIDAY, *July* 20, 1894.

(Caption omitted.)

Defendant, by order of court, is allowed further time, to July 30, 1894, to file his bill of exceptions.

FRIDAY, *July* 27, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

MONDAY, *July* 30, 1894.

(Caption omitted.)

On this day come the defendant, by his attorney, and files his assignment of errors and petition for a writ of error to the Supreme Court of the United States, together with his petition supported by affidavit, praying for appeal in this cause at the expense of the United States.

AUG. TERM, 1894, TUESDAY, *Aug.* 14, 1894.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error, taking this case to the Supreme Court of the United States, has been issued by the said clerk.

It is therefore hereby ordered by the court that execution of sentence, heretofore pronounced in this cause, be stayed pending the action of the Supreme Court.

10 *Bill of exceptions.*

United States circuit court, western district of Arkansas, May term, 1894.

UNITED STATES *vs.* ALEXANDER ALLEN. } Murder.

Be it remembered that on this, the regular May term, 1894, of the U. S. circuit court for the western district of Arkansas came on to be tried the above styled cause.

Whereupon the United States, to maintain the issues on her part, introduced and examined the following named witnesses: George Erne, William A. Henson, Willie Erne, Magdaline Erne, Thomas H. Buford, N. M. Clifford, A. W. Knotts, Jas. A. Aldridge, J. W. Hayden, George Quackenbush.

George Erne, among other things, testified that he was 16 years old; that Phillip Henson, a white boy and not an Indian, about 17 years old, was shot and killed by the defendant in the Cherokee Nation, Indian Territory, on the 15 day of May, 1892; that the killing was done on Saturday in a wheat field near Marks' place. First time he ever saw defendant was on Tuesday or Wednesday before the killing, which was on Saturday after. On that day, when he first saw defendant, he was with another boy, Jim Marks, near a straw stack. Phillip Henson and Willie Erne were talking to defendant, who asked about Mr. Morgan's
11 horses; said he was hunting the horses in the field, and "I told him he needn't hunt for horses inside of the field, because they are not in here." I said, "Don't go that way, pa don' allow anybody in the hog lot." The defendant and Jim Marks had dogs with them. Phillip Henson had no conversation with them. They went on away and I saw them no more till on Saturday, the time of the shooting. On Saturday Phillip Henson, Willie Erne, and myself had started across the wheat field to go to the lake afishing—this was about 10 or 11 o'clock, forenoon—we were going to cross the fence above or beyond Marks' cow lot and were not going to where defendant was; we *are* were going northeast to the lake and our way did not lead us nearer than 17 or 20 steps of Marks' yard. Our home was southeast from Marks', and when we started fishing we did not know that defendant was there; we went that way because it was nearer to reach the lake. We did not know defendant was there. The wheat in the field we went across was about six inches high. The fence we had to cross was a wire fence of six strands; we were not going across at yard, but down beyond lot. We first saw defendant sitting down

behind Marks' hog pen. He got up and went up along the fence on Marks' side and stopped, and we were going on our way toward the lake and we were about 20 steps at that time from the fence, and defendant hollowed to me and said: "George, where are you going?" I said, "Going over to the lake fishing." He kept walking and so did we. He had on boots or shoes. He stopped and took out his pistol and told
12 us to stop. He was at the fence at that time. Before that defendant had remained squatted down behind something in the yard until we were about 50 steps away, and then he got up and started along fence. The fence was ours. He handed the scabbard of his pistol to the Marks boy and told him to hold it. He then got through the fence and came out to where Phillip Henson, Willie Erne, and myself were. He said to me: "I heard that you told Morgan that I told a lie on you." I said, "Well, maybe you did." He then walked up to Phillip Henson, his pistol in his right hand, and hit him in his nose with his left hand and shoved him back, and then he drew his pistol and Phillip Henson grabbed the pistol and mashed it down and it went off into the ground, and he got the pistol away from Phillip Henson and shot Henson under the left arm, and then when Phillip Henson turned around he shot him in the back. When he shot Henson first time Henson started toward his home, and he had gone about three steps when defendant shot him second time in the back. Defendant then shot me through the muscle of my right arm. The time he shot me I was going towards home in a fast walk. My brother Willie was going towards home also, and defendant snapped his pistol at him. Then defendant started back towards the fence and went on to the house, he and the Marks boy, and got a valise and a churn and got in their cart and went towards Coffeyville as fast as the horse could run. Phillip Henson went about five or six steps from where he was shot, and fell and died then. Deceased and Willie Erne and myself got 16 or 17 steps from the fence when defendant came out to us. We had white willow sticks, four or five feet long, about as big as my thumb. We got them to kill frogs with for bait. The shooting was about ½ mile from Henson's home. My brother Willie was 11 or 12 years old at that time.

13 Never saw defendant but once before the day of the killing. Had no quarrel or difficulty with him. Phillip had difficulty with him. Phillip Henson didn't tell defendant this: "God dam' you, we will be up there to settle with you Saturday." We did not throw clubs or rocks at defendant as he went off on Wednesday before. On the Saturday when we started to go fishing we went straight through the field, passing Marks' house to the right. We saw defendant and the Marks boy at Marks' house when we got about half way through the field. When we got up in 13 or 14 steps of Marks' defendant said, "George, where are you going?" We didn't tell him we had come to kill a "nigger." Neither Phillip Henson nor myself hit defendant at any time. Phillip Henson fell on his back 5 or 6 steps from where he was first hit by defendant and called for help. I ran to him raised his head, and rested it upon my legs, and sent Willie for Phillip's father. He said he was going to die, and for me to tell his ma and pa good-bye. There was no other people at the Marks place than the Marks boy and the defendant; when defendant halted us he told us not to go a step farther. Witness recognized clothes of deceased, showing bullet hole in side and back.

Phillip Henson was larger than I.

William A. Henson testified that Phillip Henson, the deceased, was his son, 18 years old when he was killed, on 14 May, 1892. Was not present when he was shot. He left home with the Erne boys to go down to river to see about a boat we had on the river. We had a boat down there. We did not want to lose it. I found my son Phillip dead in wheat field 35 or 40 rods from Marks'. He had been shot under the arm. I at once got my horse and ran him to Coffeyville, 5½ miles, and there learned it was the defendant who had shot my son. I am a white man and not an Indian. So was my son. The defendant is a colored man.

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Willie Erne testified that he was 13 years old, and was along with his brother George and Phillip Henson when defendant shot Henson. The first time I saw defendant was on Tuesday before the killing, on Saturday. I saw him and one of Marks' boys down in our field. Phillip Henson was with me, and we went up to defendent and directly my brother George came up. Defendant asked me if I had seen Morgan's horses, and George told him there was no use to hunt horses in the field and told him to get out, and directly he started on, and he asked where was best place to cross creek and said nothing. I did not see him any more till Saturday, when Phillip and George and I started to go fishing; we had some willow sticks to kill frogs with for bait. We went a little over half way and saw some one behind Marks' hoggen, and when we got up about the length of the court room (which is agreed to be about seventy feet) from the fence and defendant got up and walked along the fence and we kept walking the same way we had been walking—that is, we were walking not towards the Marks house, but northeast the yard fence, behind which was the defendant, walked north. We were not intending to go into the yard; we intended to cross north of the yard, because that was nearest to the lake, and defendant said, "Hello, George, where are you going?" and George said, "Going fishing," and defendant said, "Well, hold on; I heard you said I told a lie on you;" defendant pulled his pistol out at that time, and George said, "Maybe I did." Defendant pulled scabbard off pistol and handed it to the Marks boy, and got through the fence and walked up to Phillip Henson and hit him in the mouth with his left hand and pulled down the pistol with his right hand, and Phillip grabbed it and it shot into the ground; then Phillip dropped the pistol and he shot Phillip under the arm, and when he turned around he shot him in the back, and then he shot at George twice and hit George in the arm; he then snapped the pistol at me. I was running when he snapped at me. I ran on home and told Mr. Henson about the shooting. When we saw boys squat down by the bushes on Tuesday before the shooting we just went to them to see who they were. Defendant was fussing about crossing the creek. George Erne disputed with him. We were there 15 minutes. The dispute was about defendant going through the hog lot. When defendent shot Phillip once Phillip raised his stick, and I think he hit defendant with it. Defendant put the pistol on top wire of the fence and pointed it at us while we were about 30 yards away. He told us to stop, and we stood there till he got through the fence, and he then pulled pistol out of the scabbard and gave it to the Marks boy and came on up to us. We did not move; none of us said a word to him. The Marks

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boy was standing at the fence looking through the wire during the shooting. We did not go over on the side next to Marks, none of us. At the time defendant came out towards us Phillip Henson was nearer to defendant than George and I, and he bet Phillip was larger than George.

Magdaline Erne testified that she was the mother of George and Willie Erne; that her two sons and Phillip Henson left her home about 11 o'clock on Saturday, the 14th day of May, 1892, to go fishing. They went through the wheat fields. The boys had sticks. Shortly after they left Willie came back and told me a "nigger" had shot Phillip. I went with Henson's folks to where Phillip lay, about 30 steps from fence. My son George was shot in the arm. George is 17 and Willie is 14.

16 The sticks the boys carried were about as large as my finger. Witness identified clothes of deceased—says deceased was shot in back and in side.

Thomas Buford testified that he saw the body of Phillip at his father's home after he was shot. There were two shots in his body. His lips looked bruised and blue.

N. M. Clifford testified that he was a deputy U. S. marshal for Indian Territory and district of Kansas. Mr. A. W. Knotts and I followed the defendant to Edna, Kansas. He was at the depot. I called to him, and he got his grip and ran, and we followed him, and Mr. Davis and Mr. Knotts fired their guns in the air, and I hollowed to them not to shoot that boy. I overtook defendant; he was scared to death. I told him nobody would hurt him. I turned the boy over to Mr. Knotts, who took him on the train to Coffeyville, Kansas. Four or five days after the killing I went to the place of the killing; it was about 16th or 17th, or somewhere along then, of May. My reason for going there was a little difference in opinion of certain parties in Coffeyville in regard to the killing, and I went down there to ascertain facts for my own benefit. I first went to Erne's house and told them what I came for. I took Willie Erne and I wanted him to take me over same ground as they did the morning they left the Erne residence. I examined the wheat field and found the tracks of three barefooted boys leading from the Erne residence to the place of the killing. The tracks seemed to be four or five days old. I followed these

17 tracks to where the killing was said to have occurred, and coming out from the fence I found another track made by a person wearing shoes; that track came out meeting the other tracks, and there I found a great many tracks; the three barefooted tracks did not go beyond that point, unless one of them went 2 or 3 steps beyond and returned; the place where the three tracks and the one met was about 17 or 20 steps from the fence. O, the three barefooted tracks were not going directly toward the fence, but diagonally northeast. The shoe track above described went out to place of killing from fence and returned. Defendant's pistol had one load in it when I arrested him.

A. W. Knotts testified that he assisted in the arrest of the defendant at Edna, Kansas. Defendant ran from him and Clifford, the other officer. Defendant ran 150 yards and they caught him. They arrested the defendant day of the shooting at Edna, which is about 10 miles from place of the killing.

George Quackenbush testified that he knew defendant, and Phillip Henson in his life, and the two Ernes. The two Ernes and Phillip Hen-

would settle it on Saturday. Defendant and Jim Marks then ran off and did not see Henson and the Erne boys till the next Saturday. "On Saturday I was down on the farm, where I had gone to get the milk with Harvey Marks. I was in the yard and saw the Erne boys and Phillip Henson; they had gotten over the fence into the yard; they had sticks in their hands. I asked Phillip Henson where he was going, and he said he was hunting damned niggers. I told him I guessed he had found one. He then struck me on the arm with his stick. I then hit him in the face with my fist, and then George Erne hit me over the head with a
22 stick and knocked me down, and all of them got on me. I had my pistol in my hip pocket and I got it out and Henson grabbed it and it went off, and I then jerked loose from George Erne and shot him. I was down on my side when I shot. I shot three shots. I shot because I was scared. The three boys were on me. I was 15 years old then and was not as large as Phillip Henson. I brought the pistol from home with me. After I shot the boys I went and got my grip and the churn of milk and got in the cart with Harvey Marks and went to Coffeyville. I wanted to go home, because I had got into this trouble.

The court then instructed the jury, among other things, as follows:

"Now, gentlemen, these are the three conditions which I give you in this case. I have told you that if it is true that this defendant went up on one side of the wire fence and when there struck Phillip Henson in the mouth and then shot him, that is murder. On the other hand, if it is true that Henson and the other boys attacked him with sticks and while that attack was going on and in the heat of that affray and the sticks were not of a dangerous or deadly character, and under such circumstances he shot and killed Phillip Henson, that would be manslaughter; but if there is an absence of that condition from the case, then there is no manslaughter in it, nor could there be any self-defense in it. There could be nothing else but this distinct grade of crime known as murder; because self-defense, as I have before defined to you, contemplates the doing of something upon the part of the one slain or the ones acting with him that was either actually and really so apparently of a deadly character, or that which threatened great violence to the person, or that which seemed to do so. If they
23 assaulted him with these sticks, and they were not deadly weapons, and they were engaged in a conflict, and in that conflict the defendant shot Phillip Henson, without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that deadly weapon in a dangerous way, then that would be manslaughter, and it could not be self-defense, because the injury received would not be of that deadly character or that dangerous nature that would give a man the right to slay another because of threatened deadly injury or actual great bodily injury received." To the giving of which instructions the defendant at the time excepted.

The court, among other things, charged the jury as follows:

It is for you to take this evidence that has gone before you in this case in order to ascertain which of these conditions exist, and I will not worry your patience by giving you anything further from the law, except as to how these classes of evidence known as positive testimony and circumstantial evidence are to be regarded by you. I have given you sufficient to show you how the law regards them; I have told you that whenever there

is a conflict, especially in the testimony of the positive statements of witnesses about an occurrence, you are to see what circumstances are left around it going to show that one or the other of these statements are true. Then I ask you to take into consideration all the evidence of that kind; the evidence of witnesses given to you in the shape of positive statements. You are to weigh these statements in connection with these circumstantial facts. There is another thing. When a witness goes on the stand
24 it is your duty to measure and weigh the credibility of that evidence given by him, and you do it from the manner in which he testifies, the character of the evidence, its probability and reasonableness, especially when considered in the light of these inanimate facts called circumstances, and you are to weigh it by the light of your best judgment. Then you take the evidence of that witness. You see whether or not it harmonizes and corresponds with the statements made by the witness at other times and other places. If it does not, that is evidence that it may be untrue, because as I have told you, the truth at all times is harmonious. The statement of a witness upon the stand is in harmony with statements made by him elsewhere, if he is telling the truth, unless he is able to explain to you that he has made a mistake at some other time; and unless he can, his evidence to be true must be in substantial harmony with all other statements made by him. If he has made statements contradicting what he has said on the stand, that is an evidence of falsity. That is a legitimate way of ascertaining the truth; it is one of the correct methods; it is one of the certain methods of weighing the evidence of witnesses; one of the correct ways of ascertaining whether it is false or not; and if it is false in one particular in a material respect, while he may tell the truth in some particulars, yet it creates such a presumption against his evidence as that you would be authorized to disregard it unless he explains its inconsistency.

The court, among other things, charged the jury as follows:

"You are to take all the facts and circumstances. You are to see what the motive of this killing was by the light of these facts and cir-
25 cumstances. You are to take the conduct of the defendant at the time of the killing; the conduct of these other parties. You are to see whether or not the shots of the defendant were repeated; whether they were in the back. The very location of the wounds becomes evidence that may be taken into account to show the character of the act as done. You are to see what his conduct after that time; whether it was in harmony with the conduct of a man acting under a consciousness of an innocent act, or whether it was in harmony with the conduct of a man conscious of guilt as that he was fleeing from friends and from justice; because that is a pertinent fact, upon the idea that men who are innocent of crime, and consciously so, do not flee from the act done; they do not flee from the presence of those who may undertake to investigate the act done. On the contrary, as a general rule, those who are prompted by a consciousness of guilt do flee from the act done and from those who seek to investigate it. The presumption raised from it is not conclusive, when a party may be able to explain it away showing that the flight was upon other grounds than consciousness of guilt; but in the absence of an explanation of that kind you have a right to take it into account as a pertinent fact in the case."

To the giving of which charge the defendant at the time excepted.

The court, among other things, charged the jury as follows:

"Now, in this case, the defendant has gone on the stand before you and made a statement. You are to see how this statement harmonizes with statements made by him at the other trial, and you are to see how
26 these statements harmonize with those circumstances, going to illustrate the character of the occurrence. If they are in harmony then they support each other, and that is evidence of the truthfulness of these statements. If they are inharmonious, the statements made by him now, with the statements made by him on the stand at another time, or with the circumstances in the case, that is an evidence of the falsity of his statements. If his testimony is contradicted by the testimony of that character, then it is weakened. Of course this rule, as to the harmony of evidence as to its being consistent, applies to all witnesses when that state of case may be applicable. You are to see the defendant's condition, the circumstances under which he testified in passing upon the truthfulness of his evidence, and above all you are to weigh that evidence in the light of the other circumstances that you may find to be true. If these other facts and circumstances contradict him, as I have told you, his testimony is weakened; it may be destroyed by these contradictory facts. On the other hand, if they correspond or are in harmony, then it would strengthen his evidence. Then take the evidence of all these witnesses; weigh it properly, deliberately, and dispassionately, by the light of the rules I have given you, by the light of your experience and observations in life as to the actions and conduct of men under a given state of facts and circumstances, in order that you may be able to *to* get at the truth of this case, because that is what you want to find. First, that a man, the deceased, has been killed. That you will have no difficulty in finding. Then you want to find the means used in taking his life; you want to find then who it was that took his life; then you want to find the character of the act that resulted in his death; and then your duty is to say exactly and correctly what that character of act is, because, as I have already told you, you are not
27 only to find the character of the act, but you are to speak it as the honest voice of the law, applicable to a state of case correctly found by you, that it may stand as a true verdict, as a true finding upon your part.

"Now, the law says that you can not find the defendant guilty of any crime unless you are satisfied from the whole of this testimony and the law I have given you that the state of case which makes a crime is established beyond a reasonable doubt. That means, established to that degree of certainty that reasonable men are satisfied by testimony that a condition is established, and with that degree of certainty that they would act upon that conclusion as reasonable citizens outside of the jury box, and would come to a like conclusion and act upon it in the performance of their duties as citizens. In other words, that it is established, so that there is driven out of the case not any doubt, not every doubt, because you can not drive out that kind of doubts from any kind of case; they flit before us always when we may be hunting for a rational conclusion. We can not get rid of such doubts; but they are not doubts to which we pay any attention. The law defines the kind of doubt that we are to regard as a doubt for which a

good reason can be given, a doubt that would so operate upon the mind of a reasonable man that he is not able to say that he has an abiding conviction to a moral certainty of the truth of the charge. When his mind is in that condition, then he is satisfied the case is not proven; but when it is carried beyond that, when he considers the law as given defining the crime, when he considers the proof as offered, and when he makes an application of the truth of the case as found by him to that law defining crime, and he is able to say that he has an abiding conviction to
28 that degree of certainty that he would require to exist before he would act upon it as a citizen upon a matter of importance, his duty is to say that the crime is established, and that it is proven, and his duty will be to find guilt of crime of the kind charged when it is established."

To the giving of this charge the defendant at the time excepted.

Whereupon the jury retired to consider of their verdict, and after due deliberation returned into court a verdict of guilty of murder, whereupon the defendant filed a motion for a new trial, which motion is as follows, to wit:

United States circuit court, western district of Arkansas.

UNITED STATES }
vs.
ALEXANDER ALLEN. }

Comes the defendant, Alexander Allen, and moves the court to set aside the verdict in this case and grant him a new trial, and for causes for motion assigns the following:

1st. Because the verdict is contrary to the law.

2nd. Because the verdict is contrary to the evidence.

3rd. Because the court erred in the admission of evidence over the objections of defendant.

4th. Because the court erred in his charge of the law to the jury.

5th. Because the court erred in refusing to charge the law to the jury as asked by the defendant.

And for other good and sufficient reasons.

C. J. FREDERICK,
Atty. for Deft.

Which motion was by the court overruled.

To all of which rulings of the court the defendant at the time excepted and hereby tenders this, his bill of exceptions, and prays that the same may be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

(Endorsed on back:) Filed July 27, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

29 *Assignment of errors.*

United States circuit court, western district of Arkansas, May term, 1894.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

The defendant, Alexander Allen, files this his assignment of errors committed on the trial of said cause.

1st. It was error to charge the jury as follows:

"Now, gentlemen, these are the three conditions which I have given you in this case. I have told you that if it is true that this defendant went up on one side of fence and then and there struck Phillip Henson in the mouth and then shot him that is murder. On the other hand, if it is true that Henson and the other boys attacked him with sticks, and while that attack was going on and in the heat of the affray, and the sticks were not of a dangerous or deadly character, and under such circumstances he shot and killed Phillip Henson, that would be manslaughter. But if there is an absence of that condition from the case, then there is no manslaughter in it, nor could there be any self-defense in it. There could be nothing but this distinct grade of crime known as murder, because self-defense, as I have defined it to you, contemplates the doing of something upon the part of the one slain or the ones acting with him that was actually and really or apparently of a deadly character, or that which threatened great violence to the person, or that which seemed to do so. If they assaulted him with these sticks and they were not deadly weapons and they were engaged in a conflict and in that conflict the defendant shot Phillip Henson without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that deadly weapon in a dangerous way, then that would be manslaughter, and it could not be self-defense, because the injury received would not be of the deadly character, or that dangerous nature that would give a man the right to slay another because of threatened deadly injury or actual great bodily injury received."

2nd. It was error to charge the jury as follows:

"You are to take all the facts and circumstances. You are to see what the nature of this killing was by the light of these facts and circumstances. You are to take the conduct of the defendant at the time of the killing; the conduct of the other parties. You are to see whether or not the shots of the defendant were repeated, whether they were in the back. The very location of the wounds becomes evidence that may be taken into account to show the character of the act as done. You are to see what was his conduct after that time; whether it was in harmony with the conduct of a man acting under a consciousness of an innocent act, or whether it was in harmony with the conduct of a man conscious of guilt as that he was fleeing from friends and from justice because that is a pertinent fact, upon the idea that men who are innocent of crime and consciously so do not flee from the act done, they do not flee from the presence of those who may undertake to investigate the act done. On the contrary, as a general rule, those who are prompted by a consciousness of guilt do flee from the act

done and from those who seek to investigate it. The presumption raised from it is not conclusive *wh* where a party may be able to explain it away, showi*ng* that the flight was upon other grounds than consciousness
31 of guilt, but in the absence of an explanation of that kind you have a right to take it into account as a pertinent fact in the case."

3rd. The court also, among other things, charged the jury as follows:

"Now, in this case the defendant has gone on the stand before you and made a statement. You are to see how this statement harmonizes with statements made by him at the other trial, and you are to see how these statements harmonize with these circumstances, going to illustrate the character of the occurrence. If they are in harmony, then they support each other, and that is evidence of the truthfulness of his statements. If they are inharmonious, the statements made by him now, with the statements made on the stand at another time, or with the circumstances in the case, that is an evidence of the falsity of his statements. If his testimony is contradicted by the testimony of that character, then it is weakened. Of course this rule as to the harmony of evidence, as to its being consistent, applies to all witnesses when that state of case may be applicable. You are to see the defendant's condition, the circumstances under which he testified, in passing upon the truthfulness of his evidence, and above all you are to weigh that evidence in the light of the other circumstances that you may find to be true. If these other facts and circumstances contradict him, as I have told you, his testimony is weakened; it may be destroyed by these contradictory facts. On the other hand, if they correspond or are harmonious, then it would strengthen his evidence. Then take the evidence of all these witnesses, weigh it properly, deliberately, dispassionately, by the light of the rules I have given you, by
32 the light of your experience and observation in life as to the actions and conduct of men under a given state of facts and circumstances, in order that you may be able to get at the truth of this case, because that is what you want to find."

Wherefore the above stated errors considered, the said defendant prays that the judgment and sentence against him be reversed, and a new trial be granted him.

ALEXANDER ALLEN,
By his attorney, C. J. FREDERICK.

(Endorsed on back:) Filed July 30, 1894. S. Wheeler, cl'k, by I. M. Dodge, D. C.

33 *Petition for writ of error.*

United States circuit court, western district of Arkansas.

UNITED STATES *vs.* ALEXANDER ALLEN. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, Alexander Allen, represents that at the May term, 1894, of said court, he was convicted on an indictment charging him with the

crime of murder, and that the said court has pronounced judgment and sentence of death upon the petitioner of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing said cause and the record therein to the said Supreme Court, in order that the same may be there examined, and if error be found that the judgment and sentence against him therein may be reversed.

ALEXANDER ALLEN.
By C. J. FREDERICK,
His Attorney.

(Endorsed on back:) Filed July 30, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

34 *Poverty affidavit.*

United States circuit court, western district of Arkansas, May term, 1894.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

I, Alexander Allen, the defendant in the above-styled cause, do solemnly swear that I am not possessed of sufficient means and am not worth $10.00 above my wearing apparel, and am unable to procure the same so as to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperis.

ALEXANDER ALLEN.

Sworn to and subscribed before me the 25th day of July, 1894.

STEPHEN WHEELER, *Clk.*
By J. M. BAXTER, *D. C.*

(Endorsed on back:) Filed July 30, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western dist. of Ark., greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States, plaintiff, and Alexander Allen, defendant, a manifest error hath happened, to the great damage of the said Alexander Allen, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date thereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14 day of August, in the year of our Lord one thousand eight hundred and ninety-four.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States
for the Western Dist. of Ark.

Allowed by

Justice of the Supreme Court of the United States.

36 UNITED STATES OF AMERICA, *ss:*

To Jas. F. Read, U. S. attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Alexander Allen, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Isaac C. Parker, judge of the district court of the United States, this 14 day of August, in the year of our Lord one thousand eight hundred and ninety-four.

I. C. PARKER,
U. S. District Judge holding Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of A. D. 189 .

I, Jas. F. Read, U. S. dist. attorney for the western district of Arkansas, hereby accept service of the within citation this 17th day of August, A. D. 1894.

JAS. F. READ, *U. S. Dist. Atty.*

37 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true

and complete copy of the record in the case of U. S. vs. Alexander Allen, the original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 17 day of August, A. D. 1894.

[SEAL.]

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 15672. Term No. 788. Alexander Allen, plaintiff in error, vs. The United States. W. Arkansas C. C. U. S. Filed August 23, 1894.

Office Supreme Court U. S.
FILED.
MAR 1 1895
JAMES H. McKENNEY,
CLERK.

15 1-6-15

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

ALEXANDER ALLEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 788.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

ALEXANDER ALLEN, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 788.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

This case has once before been before this court, 150 U. S., 551, where the facts are fully stated and vary in no substantial particular from those stated in the present record.

The judgment of the court below was reversed and the verdict set aside because of error in the charge of the court below on the question of justifiable homicide.

It is here again on writ of error; and again the error assigned is to certain portions of the charge delivered by the court to the jury.

ASSIGNMENTS OF ERROR.

I.

These will be found on pages 16 and 17, and consist of three copious extracts from the charge delivered to the jury.

While to each of these three portions of the charge an exception was noted at the time, it yet can not escape the attention of the court that in neither of the three was any specific and distinct error pointed out, nor any distinct proposition of law indicated by the exception as the one to which the exception was directed.

In *Holder* v. *United States* (150 U. S., 92), this court said:

> The rule is that a general exception to a charge which does not direct the attention of the court to the particular portions of it to which objection is made, raises no questions for review.

And in *Connecticut Life Insurance Company* v. *Union Trust Company* (112 U. S., 261), the court said:

> The attention of the court should have been called to the particular point by something more definite than the general exception taken. (*Beckwith* v. *Bean*, 98 U. S., 284; *Lincoln* v. *Claflin*, 7 Wall., 132; *McNitt* v. *Turner*, 16 Wall., 362; *Beaver* v. *Taylor*, 93 U. S., 46.)

See also *First Unitarian Society* v. *Faulkner* (91 U. S., 415); *Railroad Company* v. *Varnell* (98 U. S., 479).

> It will be seen at once that each of the three portions of this charge which are made the ground of the assignment of errors contains several distinct and wholly independent propositions of law. Under

this general form of exception which has been adopted, if any one of these propositions is found to be correct, the exception must fail.

We will consider presently how far the propositions embraced in these extracts from the charge are correct statements of law.

II.

Before proceeding to that, however, it may be well to direct attention to the errors which appear in the assignment of errors, in what purport to be correct extracts from the charge.

In the first assignment, in the third line of the extract, appears this sentence:

> I have told you that if it is true that this defendant went up on one side of fence, and *then and there* struck Philip Henson in the mouth, and then shot him, that is murder.

Now, turning to the charge itself, as it is found on page 12, certified by the judge in the bill of exceptions, we find the statement to be as follows:

> I have told you that if it is true that this defendant went up on one side of the *wire fence* and, *when there*, struck Philip Henson in the mouth, and then shot him, that is murder.

It will be seen that the plaintiff in error has substituted the words "then and there" for the words "when there," and has omitted altogether the words "the wire" before the word "fence."

Again, in the eighth line, page 16, there is a sentence beginning, "But if there is an absence," etc., whereas in

the charge, as found in the bill of exceptions, on page 12, it will be seen that there is no sentence introduced by these words, but that they occur in the middle of a sentence after a semicolon.

So in the tenth line, in the sentence beginning "There could be nothing," the word "else" is omitted, thereby changing the sense of the sentence.

Again, in the second assignment of error. In the fourth line from the bottom of the paragraph, the word "where" is substituted for the word "when" in the original charge.

These may in themselves appear to be trivial variations, but their importance consists in this: that the paragraphs appearing in the assignment of errors purporting to be extracts from the charge delivered by the judge to the jury appear upon inspection not to be extracts from that charge at all.

It is not permitted to a party, who is complaining in a court of review of error alleged to exist in a charge or instruction given by the trial judge, to paraphrase that charge or instruction and to substitute for the exact language employed by the court below other language which the party complaining may think is an equivalent.

Non constat but that his ground of objection was the very words which he has substituted for the words employed by the court below. His assignment of error, we respectfully submit, must set out the very words themselves, and all of them, which appear in that portion of the charge to which his exception is directed.

III.

A careful consideration of these three paragraphs discovers no error of which the plaintiff in error here can be heard to complain or which will justify this court in a reversal of the judgment. It will be observed that the entire charge of the court below is not set out in the bill of exceptions, but only extracts therefrom. The first sentence in the first assignment of error begins thus: "Now, gentlemen, these are the three conditions which I have given you in this case."

All that follows seems to be either an epitome or condensed form of what had preceded, to wit, the full statement of these three conditions, and yet, neither in the bill of exceptions nor in the assignment of error, does it appear what these three conditions were which the court had given to the jury.

He says:

> I have told you that if it is true that this defendant went up on one side of the wire fence and, when there, struck Philip Heusen in the mouth, and then shot him, that is murder.

Well, now, of course that would not be murder unless Philip Heusen was killed by the shot; and yet that essential feature is omitted from this part of the judge's charge, while beyond a doubt it was fully and elaborately presented in "the three conditions" previously stated by the court.

> On the other hand, if it is true that Heusen and the other boys attacked him with sticks, and while the attack was going on, and in the heat of that affray, and the sticks were not of a dangerous or deadly

> character, and under such circumstances he shot and killed Philip Hensen, that would be manslaughter; but if there is an absence of that condition from the case, then there is no manslaughter in it, nor could there be any self-defense in it.

This, we submit, is a correct expression of the law.

Killing without premeditation, in a sudden quarrel, in heat of an affray, is not murder, but is manslaughter. The absence of these mitigating circumstances would give to the killing the character of murder.

The remainder of this paragraph is but an elaboration of the same idea.

The second assignment of error tells the jury what they are to consider in determining the character and grade of the offense, if any:

> You are to take all the facts and circumstances; you are to see what the nature of this killing was by the light of these facts and circumstances; you are to take the conduct of the defendant at the time of the killing; * * * you are to see what was his conduct after that time, whether it was in harmony with the conduct of a man acting under the consciousness of an innocent act, or whether it was in harmony with the conduct of a man conscious of guilt, etc.

Then follows a careful statement of the presumption that may be drawn from flight, of which certainly the defendant could not complain.

IV.

The third assignment relates to the method which the jury should employ in ascertaining the weight to be given

to the defendant's testimony in his own behalf; as to which the court said, after stating the method:

> Of course, this rule as to the harmonyo f evidence, as to its being consistent, applies to all witnesses when that state of case may be applicable.

The court said:

> Now, in this case the defendant has gone on the stand before you and made a statement. You are to see how this statement harmonizes with statements made by him at the other trial, and you are to see how these statements harmonize with these circumstances, going to illustrate the character of the occurrence. If they are in harmony, then they support each other, and that is evidence of the truthfulness of his statement. If they are inharmonious, the statements made by him now, with the statements made on the stand at another time, or with the circumstances in the case, that is an evidence of the falsity of his statement. If his testimony is contradicted by the testimony of that character, then it is weakened.

It will be observed that while these remarks were applied to the defendant as a witness, they were not applied to him in his character of defendant, but were, as the court said, applicable "to all witnesses when that state of case may be applicable."

It merely directs the attention of the jury to the fact that in determining the degree of weight to be attached to the testimony of a witness, they should have regard to the accuracy of the witness, as that accuracy may have been illustrated in the comparison of statements of the same transaction made by him at different times. It does not necessarily involve any question of the truthfulness

of the witness; it may refer to his accuracy of perception, attention, memory, or expression. But from whatever cause it proceeds, if the result exhibits a disparity or diversity in his testimony as to the same transaction when delivered on different occasions, the jury may and should take that into account in determining the force and weight to be allowed his testimony.

We are unable to see on what ground the correctness of the view here stated by the court can be impeached. Even in the State courts, where far less latitude is allowed to the court in commenting before the jury upon the weight of the testimony than in the Federal courts, such an admonition as this from the trial judge would be accepted as legitimate and proper.

But the court, in the same paragraph, proceeded as follows:

> You are to see the defendant's condition, the circumstances under which he testified, in passing upon the truthfulness of his evidence, and above all you are to weigh that evidence in the light of the other circumstances that you may find to be true. If these other facts and circumstances contradict him, as I have told you, his testimony is weakened; it may be destroyed by these contradictory facts. On the other hand, if they correspond, or are harmonious, then it would strengthen his evidence. Then take the evidence of all these witnesses, weigh it properly, deliberately, and dispassionately by the light of the rules I have given you, by the light of your experience and observation in life as to the actions and conduct of men under a given state of facts and circumstances, in order that you may be able to get at the truth of this case, because that is what you want to find.

The only part of this charge which is obscure, the meaning of which is not at once apparent, is the opening sentence: "You are to see the defendant's condition, the circumstances under which he testifies," etc.

Just what the learned judge meant by the "defendant's condition," and to what he referred by "the circumstances under which he testified," is not as clear as it might be. If he meant to direct the attention of the jury to the fact that the defendant was there *as defendant*, testifying in his own behalf, and that that was his condition, then the objection to this portion of the whole paragraph which is excepted to presents a question as to how far, if at all, it is proper for a court to call the attention of a jury to the interest which the witness, as a defendant, has in the issues upon which he is testifying.

In 2 Thompson on Trials, section 2445, the learned author, in treating of the subject of charging the jury, says:

> In the opinion of most American courts, it is proper for the judge, in a case where the accused person has testified as a witness in his own behalf, to advise the jury that in determining the value of his testimony they are at liberty to take into consideration the fact of his interest in the result of the trial; provided he at the same time cautions them that the weight which they shall give to his testimony is exclusively for their determination.

The numerous cases cited in support of this proposition seem, from examination of them, fully to sustain it. They are all decisions of the State courts, principally California, Illinois, and Missouri. None go further than

the statement in the opinion of the court in *People* v. *Petmecky* (99 N. Y., 415). Now, here, all that the court below said was that the jury should weigh the testimony of the defendant "in the light of the other circumstances that you may find to be true."

If the other facts and circumstances contradicted the testimony of the defendant, to that extent his testimony was weakened. If they confirmed it, to that extent it was strengthened. He cautioned the jury to take the evidence of "all these witnesses" and to weigh it properly, deliberately, and dispassionately. All that the judge said to the jury was undoubtedly sound. In saying anything at all as to the witness being the defendant in the case, he doubtless meant no more than to prevent an impression being formed on their minds from the fact of a person accused of crime being permitted to testify at all; that the liberty thus allowed him of testifying in his own behalf must not be taken by the jury as a token of his infallibility as a witness, or of his immunity from any of the tests as to truthfulness and accuracy, to which all other witnesses were subjected.

In *Hicks* v. *United States*, 150 U. S., 450, the obvious objection to the instruction given by the judge in that case was, that it presented to the jury the testimony of the defendant as in sharp contrast with that of the other witnesses. Referring to it as a "conflict as to the material facts between his statements and the statements of the other witnesses who are telling the truth."

The inference which the jury might well draw from this language was, that the defendant offered himself as a witness under a cloud of doubt as to his truthfulness.

But as to the defendant's testifying in his own behalf, this court plainly intimated, on p. 452, that that was a legitimate subject of caution by the trial court to the jury.

In conclusion, we repeat that it is hardly a fair and reasonable rule for determining the correctness of a charge given by a court to a jury to cull out from that charge extended paragraphs and present them, dissociated from their context, as true and complete expressions of the law as expounded in the charge taken in its entirety; as well seek to determine the character and extent of an edifice, its architecture, its proportions, and its utility, by a detached brick or stone taken from its walls.

In *Reagan* v. *Aiken* (138 U. S., 109) it was held that where the entire charge is not set out in the record, and there are no exceptions to it, the court will presume that the law was fully and correctly stated.

And so in *Cooper* v. *Schlesinger* (111 U. S., 148) where a charge embraces several distinct propositions a general exception is of no effect if any one of them is correct.

Now, it can not be questioned but that in each one of the three paragraphs extracted from the charge of the court here and made respectively the grounds for the assignment of error, there are correct statements of proposition of law. If either of them contain incorrect statements of propositions the learned counsel representing the plaintiff in error have not thought it worth their while to separate the wheat from the chaff, but have sought to devolve that duty upon this court of review.

HOLMES CONRAD,
Solicitor-General.